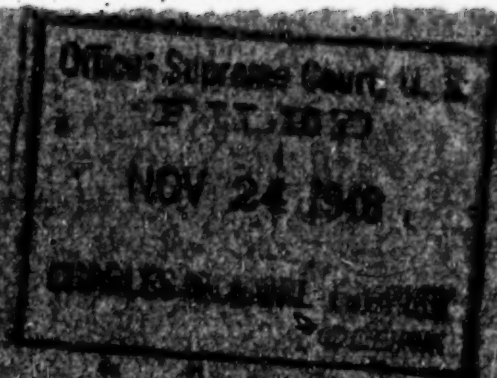


LIBRARY
SUPREME COURT, U.S.



No. 416

In the Supreme Court of the United States

OCTOBER TERM, 1948

UNITED STATES OF AMERICA, APPELLANT

WALLACE & THORNTON CO., INC., RE AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF PUERTO RICO

APPELLANT'S BRIEF IN OPPOSITION TO THE MOTION TO
DISMISS

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 416

UNITED STATES OF AMERICA, APPELLANT

v.

WALLACE & TIERNAN CO., INC., ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF RHODE ISLAND

APPELLANT'S BRIEF IN OPPOSITION TO THE MOTION TO DISMISS

1. THE APPEAL WAS FROM THE FINAL JUDGMENT OF THE DISTRICT COURT

Appellee's motion to dismiss asserts (pp. 2-3) lack of jurisdiction of the appeal upon the ground that the judgment dismissing the cause was entered on September 3, 1948, whereas the appeal taken on October 4, 1948, was from a judgment of dismissal entered on August 6, 1948. We submit that this contention is wholly without merit.

(1)

The district court in its opinion of August 6, 1948, directed entry of a judgment of dismissal. On the same day the clerk of the district court entered a judgment of dismissal as follows:

OPINION filed and **JUDGMENT** entered dismissing the action without prejudice and the Government's "Request" for judgment and relief prayed for in the complaint is denied.

Under Rule 58 of the Federal Rules of Civil Procedure, this judgment constituted the judgment in the cause. This Rule provides that when a court directs that all relief be denied, the clerk of the court shall promptly enter judgment. The Rule further provides that the clerk's notation of a judgment in the civil docket as provided by Rule 79 (a) "constitutes the entry of the judgment." Since, therefore, the judgment dismissing the present action was entered when the clerk made the required entry of judgment on August 6, 1948, the parallel judgment later entered by

The concluding paragraphs of the opinion read:

"The Government's request for judgment and relief prayed for in the complaint is denied and judgment may be entered dismissing the action without prejudice.

"It is so ordered."

Rule 79 (a) requires the clerk to keep a book known as "civil docket" in which he shall enter each civil action to which the Rules are made applicable. The Rule provides, among other things, that "all appearances, orders, verdicts, and judgments shall be noted chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number."

the district judge is without legal significance. Not only had the district judge no power, under the Rules, to supersede the judgment previously entered by the clerk, but no such intent on his part can properly be inferred. In signing a formal judgment on September 3, 1948, the district judge acted at the request of counsel for the United States.³

But even if the judgment of dismissal was, in fact, entered on September 3, 1948, any defect in the appeal by reason of failure to refer to this judgment is "so insubstantial" and "of such a technical nature" that it must be disregarded. *Hoiness v. United States*, No. 20, this Term, slip opinion 3-4.⁴ As in the case just cited, whether the judgment of dismissal was entered on one or the other of the two dates in question, the appeal was timely,⁵ the assignment of errors identifies the issues sought to be reviewed, and the scope of review is the same.

³ Government counsel—members of the staff of the Boston office of the Antitrust Division—made this request because they had been informed by the district judge, at least as counsel understood, that no entry of judgment had been made pursuant to the court's opinion of August 6, 1948.

⁴ While in this case the Court gave weight to the policy expressed in Section 954 Revised Statutes, and while this section was repealed as of September 1, 1948 (Pub. L. 773, 80th Cong., Sec. 39), the repeal was for the reason that the provisions of the section were covered by Rules 1, 15, and 61 of the Federal Rules of Civil Procedure (H. Rep. No. 308, 80th Cong., 1st Sess., p. A239).

⁵ The appeal was taken on October 4, 1948, within the sixty-day time limit from either date.

2. THE JUDGMENT DISMISSING THE ACTION WAS NOT A JUDGMENT OF NONSUIT ENTERED AT THE REQUEST OF THE PLAINTIFF

We submit that there is no merit in appellees' contention (motion pp. 4-15) that, in substance, the plaintiff had requested entry of a judgment of nonsuit and that for this reason the judgment is not appealable.

The purpose of a voluntary nonsuit is to enable the plaintiff to institute a new suit on the same cause of action. Here what the plaintiff sought was, not opportunity to begin a new suit, but entry of a judgment disposing of the case so that there might be appellate review of the rulings barring proof of the plaintiff's case. An appeal obviously lies when judgment is entered against a plaintiff after evidence material to its cause has been excluded. We submit that an appeal equally lies from the judgment where, as here, the plaintiff had foreknowledge that the trial court's rulings would be adverse and these rulings excluded substantially all the plaintiff's evidence.

Appellees rely upon the statement in the district court's opinion that: "The reality here practically amounts to non-prosecution." We assume, as do appellees (motion p. 8), that the basis for this conclusion was the statement of Government counsel that evidence other than that which had been excluded might "conceivably" be obtained by the Government "after an investigation coex-

tensive in time and labor with that heretofore undertaken." What such a coextensive investigation would mean, in time and labor, is indicated by the facts set forth below.⁶ The more thorough the culling of the incriminating evidence in the grand jury proceedings which climaxed the prior investigation, the lesser the likelihood of obtaining adequate other evidence in a new investigation. Furthermore, if the district court's present rulings have as broad a scope as that ascribed to them by appellees, the new investigation would have to be by lawyers not contaminated with knowledge obtained through participation in the grand jury proceedings, in other words, by lawyers not familiar with the case.

The Government, instead of following this hard and dubious course, elected to prosecute the pending case to its end. This is the reverse of consenting to dismissal of its suit. We submit; therefore, that the "reality" amounts to prosecution, not "non-prosecution."

Appellees imply that the Government improperly invited or maneuvered for the judgment

⁶ Investigation of the question of defendants' violation of the antitrust laws began in 1942 and ended with the return of the criminal indictment in November 1946. In the course of the investigation four members of the staff of the Antitrust Division examined the defendants' books and records from time to time during a seven-months' period, and Government lawyers participated in the grand jury investigation during a period of over six months. See affidavit of Chalmers Hamill, pp. 1-3 (item 8 of Government's praecipe).

against itself. But there was nothing improper in Government counsel stating candidly to the Court and appellees that the documentary evidence excluded by the district court's rulings was essential to the Government's case, and that the Government could not proceed unless and until these rulings were reversed on appeal. Nor in such circumstances was there anything improper in Government counsel asking the Court to enter a final judgment so that the case could be appealed—even though it was obvious that the judgment would be against the Government. The alternative of introducing such fragmentary other evidence as the Government might have, knowing that it was insufficient to make out a case, and appealing from the adverse judgment which would then be entered, would have been time-consuming shadow-boxing. We submit that the course pursued by Government counsel was the only reasonable method of protecting the public interest in a situation in which the rulings of a single district judge would, if not reversed, have the practical effect of giving immunity to alleged violators of the antitrust laws, and that the frankness of counsel in stating what they were trying to do is to be commended rather than criticized.

But even under the district court's theory of nonprosecution, this Court has jurisdiction of the appeal. It is well settled that a judgment dismissing a cause for want of prosecution is a "final" judgment from which an appeal lies.

Wilson v. Republic Iron & Steel Co., 257 U. S. 92, 96; *Ruff v. Gay*, 67 F. 2d 684 (C. C. A. 5), affirmed without discussing this point, 292 U. S. 25; *Bowles v. Beatrice Creamery Co.*, 146 F. 2d 774 (C. C. A. 10). The facts here are precisely like those in the *Bowles* case, where appeals were entertained from judgments of dismissal which the trial court had entered after it had sustained motions to suppress the evidence presented by the plaintiff and after plaintiff's counsel had advised the court that he had no additional evidence to present.

It is immaterial that the judgment which was entered in the instant case dismissed the action "without prejudice." Such a judgment is "final" and appealable. *United States v. National City Lines, Inc.*, 334 U. S. 573.

3. THE APPEAL PRESENTS SOLELY THE VALIDITY OF THE DISTRICT COURT'S RULING IN THE INSTANT CIVIL PROCEEDINGS

We submit that there is no merit in appellees' contention (motion pp. 16-36) that the appeal is an attempt to obtain, by indirection, appellate review of rulings made by the district court in the two criminal proceedings (Nos. 6055 and 6070). The appeal attacks only the rulings in the civil case. Since the Government has not assigned as error any ruling made in the criminal cases, error in any such ruling is not within the issues presented by the appeal. Clearly the right to seek

correction of error committed in the present cause is not destroyed by reason of the fact that a determination by this Court that there had been such error might make it apparent that certain rulings of the district court in the criminal cases had also been erroneous.

Appellees also suggest (motion, pp. 22, 27, 33-34) that certain rulings in the criminal case are *res judicata* as to the issues presented by the appeal. The ruling of greatest significance in this connection was briefly discussed from the standpoint of *res judicata* in the next to the last paragraph of the Government's statement as to jurisdiction filed in support of its appeal. We deem it unnecessary to discuss this question further, or to discuss it in relation to Rule 41 (c) of the Federal Rules of Criminal Procedure, since the question goes to the merits of the issues raised by the appeal, not to jurisdiction of the appeal.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

NOVEMBER 1948.